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Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, *et al.*,
Petitioners,

v.

UNITED STATES NAVY, an Agency of the United States Federal Government,
Respondents.

On Petition of Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether Petitioner, whose son who was killed in an explosion on April 19, 1989 aboard the U.S.S. Iowa in Gun Turret II, should be allowed to recover pursuant to the Federal Tort Claims Act and not be barred by the *Feres* Doctrine as a member of the armed forces in bringing suit against the United States for the negligent, gross negligent, or intentional conduct of their superior officers?

A. Whether the *Feres* Doctrine should apply because the unauthorized and illegal firing of the sixteen inch guns aboard the U.S.S. Iowa is not activity incident to military service?

B. Whether the *Feres* Doctrine should apply when the harm complained of is the result of inadequate or improper training?

C. Whether the *Feres* Doctrine should apply when the harm complained of is based on a "products liability" theory?

2. Whether Petitioner has claims deriving from the events occurring after her son's death on the U.S.S. Iowa 300 miles off the coast of Puerto Rico; such wrongful acts are completely independent of the purported negligent and/or intentional conduct that led to her son's death?

3. Whether the *Feres* Doctrine should be overruled because Congress never intended to exclude the recovery of military servicemen for injury or death caused by the negligent or wrongful act or omission of any employee of the

United States while acting within the scope of his office or employment?

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UNITED STATES NAVY, an Agency of the United States Federal Government,
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PETITION FOR WRIT OF CERTIORARI

INTEREST OF PETITIONER

This case arises out of the incident on April 19, 1989, when three explosions in Turret II, on board the U.S.S. Iowa, a

United States Naval battleship, resulted in the deaths of forty-seven sailors.

Petitioner NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, Deceased,[1] filed a wrongful death suit under the Federal Tort Claims Act 28 U.S.C. Sec. 1346 and 28 U.S.C. Sec. 2671 on or about April 19, 1991, in the United States District Court for the Eastern District of Virginia, Alexandria Division, seeking the recovery of damages for the wrongful death of her son arising out of the explosions in Turret II aboard the U.S.S. Iowa.

Petitioner's complaint contained allegations that the death of her son aboard the U.S.S. Iowa was caused by the Navy's negligent design, testing, inspection, and maintenance of Turret II; negligent failure to train, evaluate, and staff the personnel for Turret II; the failure to warn of the hazards associated with the operation of Turret II; and other acts and failures to act that may be shown by discovery and investigation of this matter.[2]

The United States brought a Motion for Dismissal, or in the alternative, Summary Judgment, based on the argument that the Petitioner's claims were barred by the doctrine enunciated in *Feres* v. *United States*, 340 U.S. 135 (1950).

Petitioner argues that the *Feres* Doctrine should be overruled and that the United States Supreme Court should adopt the dissenting opinion authored by Justice Antonin

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[1] Petitioner NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, Deceased, filed her wrongful death lawsuit with thirty-seven other plaintiffs. This Writ of Certiorari is filed on the behalf NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, Deceased.

[2] See Plaintiff's Complaint, paragraph 22.

Scalia in the case of *United States v. Johnson*, 481 U.S. 681 (1987) and concurred in by Justices Stevens, Marshall and Brennan. Petitioner also argues, as she did in the District Court, that the Federal District Court should carve out an exception to *Feres* when the conduct is egregious, when training is insufficient, and or the claim is based on a theory of products liability.

The United States District Court in a Memorandum Opinion dated July 29, 1991, granted the Defendant United States' motion on the grounds that the Court lacked subject matter jurisdiction over the Petitioner's claim. An order granting the Defendant's Motion to Dismiss was entered by United States District Judge Claude M. Hilton on July 29, 1991.

Petitioner appealed to the United States Court of Appeals for the Fourth District. United States Court of Appeals in an Opinion and Order dated on September 11, 1992, affirmed the District Court's ruling.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES AND REGULATIONS

The Federal Tort Claims Act, 28 U.S.C. Sec. 1346 and 28 U.S.C. Sec. 2671 (see Appendix).

STATEMENT

On April 19, 1989 sixteen-inch guns of Turret II on the U.S. Iowa experienced three explosions which resulted in the deaths of forty-seven sailors. Among the dead was the

Petitioner's son, Fire Controlman Seaman Apprentice Richard J. Lewis. The loss of the Petitioner's son has inflicted deep emotional wounds and distress on the Petitioner.

The force of the April 19, 1989 explosions ripped throughout Turret II. Inside of the turret it became an inferno, as bodies instantaneously were engulfed in the flames of the heat and fire. The sailors who had not died from the explosions quickly succumbed to the heat and the enveloping smoke. Only twelve sailors in Turret II who were encased behind the steel doors of the powder room survived the blast.

Almost immediately after the explosion, the United States Navy began an investigation into the accidental, intentional, or unknown cause of the death of the forty-seven sailors. Instead of instituting a Board of Inquiry, the Navy appointed a single investigator, Rear Admiral Richard A. Milligan. Unsupervised and admittedly totally inexperienced as having never handled a criminal or civil investigation, Rear Admiral Richard A. Milligan ordered the clean-up of Turret II, by ordering sailors to throw overboard any and all physical evidence destroying much of the vital information; rather than attempting to preserve the scene. During the initial stages of investigation, the scope was based on the assumption that the cause was accidental. That was until six weeks had passed when the Rear Admiral initiated a criminal investigation. This investigation was prompted by information that a sailor, Kendall Truitt, was the beneficiary of fellow sailor and explosion victim Clayton Hartwig's One Hundred and One Thousand Dollars ($101,000.00) Navy insurance policy. Over the subsequent weeks, the Naval Intelligence Service (NIS) put together selective bits and pieces of Clayton Hartwig's life. With this information, and an FBI-Navy Psychological Profile, the Navy concluded that Hartwig was the probable cause of the deaths of the forty-

seven sailors. This conclusion came only four months after the incident. Concurrently, the Navy ran a series of tests on the propellent, and the projectile to see if there was an answer to the mystery of how the explosion actually occurred. In July of 1989 the Navy issued their findings and conclusions. The July report placed the blame on Clayton Hartwig. In the report, the Navy speculated that he had used a Radio Shack timer to detonate the propellant. David Smith, a friend of Clayton Hartwig, revealed the existence of the timer. Later David Smith recanted his story. Coincidentally, it was not long before the Navy changed its theory to a chemical detonation device. The Navy isolated on the projectile's rotating band, iron fibers, elements of calcium and chlorinate, and chemical compounds of glycol and polymers. The Navy concluded that the explosion was caused by a chemical detonation device that was placed between the No. 1 and No. 2 bags of propellent. Moreover, that the detonation occurred by the over ramming of the propellant thus causing the chemical to be released and detonate.

The Navy's desire to come to a quick resolution of the incident and the existence of viable alternatives prompted the Chairman, Senate Committee on Armed Services; the Chair Subcommittee on Economic Stabilization, House Committee on Banking, Finance and Urban Affairs; and the Honorable Howard M. Metzenbaum, U.S. Senate; to ask the General Accounting Office (GAO) to examine several issues concerning the explosion and the overall battleship program. They asked the GAO to:

1. *Independently investigate the Navy's technical analysis of the likely causes of the explosion;*
2. *Examine the safety and*

serviceability and the support ability of ammunition and equipment;

3. *Examine issues relating to the manning and training on the battleship; and*
4. *Review the battleship's employment plans and mission.*

The GAO and the Senate Arms Committee turned to Sandia Labs, for the independent investigation. Over the ensuing months, theory by theory, the Sandia Lab discounted the Navy's findings and conclusions. First, Sandia evaluated the Navy's theory of a chemical detonator. Tests done on the No. I and No. III turrets showed the presence of iron fibers. The Navy concluded that the presence of these fibers in the No. II turret were part of a steel wool type detonation device. Steel wool was commonly used in the cleaning of the sixteen inch guns and the turrets. The presence of these fibers in other turrets sheds some doubt as to why iron fibers were present in the gun. Sandia also concluded that the chemicals chlorinate and chlorine were from the sea water which was used to put out the fires burning after the explosion. These chemicals were also present in other turrets. Additionally, Sandia concluded that the presence of glycol and polymers were attributable to 'break-free', a lubricant used to free the logged projectile, and some plastic button, badge or pen. The overall conclusion was that in the Navy's haste it was blinded to possible reasons for the presence of foreign chemical elements.

Sandia centered its investigation on the realistic reasons the explosion occurred, the propellent. The propellant used on the Iowa was of World War II design and is considered very unstable. In the summer of 1989, cans of the propellent sat on the Navy docks under the Virginia sun. Sandia questioned whether the chemical agents used to control the stability had dropped to a dangerous level. Tests done by

both the Navy and Sandia were unable to show a significant drop in stability of such chemicals. Next, Sandia began a series of self-ignition tests, in an attempt to simulate conditions inside turret No. II. After several attempts and several test conditions, the propellant eventually self-ignited. Sandia concluded that: an inexperienced rammer-man had over-rammed the propellant twenty-six inches coupled with a reduced number of trim layers, the ignition layers would ignite the propellant. Sandia lab had proven that there was an explanation more realistic than intentional acts of a deceased sailor.

The GAO's and Sandia lab's conclusions, though not a total contradiction to the Navy's findings, shed new light on once darkened theories. Enough so, that the Navy in May of 1990, suspended all battleship firing. The investigation as to the true causes is still officially open. However, the answer lies in the negligence of the Navy and not any intentional actions by a single sailor.

ARGUMENT

1. WHETHER PETITIONER, WHOSE SON WHO WAS KILLED IN AN EXPLOSION ON APRIL 19, 1989 ABOARD THE U.S.S. IOWA IN GUN TURRET II, SHOULD BE ALLOWED TO RECOVER PURSUANT TO THE FEDERAL TORT CLAIMS ACT AND NOT BE BARRED BY THE *FERES* DOCTRINE AS A MEMBER OF THE ARMED FORCES IN BRINGING SUIT AGAINST THE UNITED STATES FOR THE NEGLIGENT, GROSS NEGLIGENT, OR INTENTIONAL CONDUCT OF THEIR SUPERIOR OFFICERS?

A. WHETHER THE *FERES* DOCTRINE SHOULD

APPLY BECAUSE THE UNAUTHORIZED AND ILLEGAL FIRING OF THE SIXTEEN INCH GUNS ABOARD THE U.S.S. IOWA IS NOT ACTIVITY INCIDENT TO MILITARY SERVICE?

In the case of *Feres* v. *United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), the Supreme Court established the doctrine that bars claims against the United States for injuries to servicemen that were incident to military to activity. Since *Feres'* inception, the test to determine what is military activity has taken several forms. Some courts have applied an absolutist rule, whereby a claim is barred where the serviceman would not have been injured but for the fact that he was on active duty. *Henninger* v. *United States*, 473, F2d 814 (9th Cir. 1973). While others have "incident to service" as depending on whether the serviceman was on or off the base at the time of injury, *Zoula* v. *United States*, 217 F2d 81 (5th Cir. 1954); *Chambers* v. *United States*, 352 F2d 224 (8th Cir. 1966).

Few lower courts have attempted to redefine and narrow the "incident to service" test by employing certain aspects of the governmental-solider relationship to formulate new tests for the allowability of an Federal Tort Claim Act claim. In the case of *Downs* v. *United States*, 249 F. Supp. 626 (E.D.N.C. 1965), it was suggested that the real question in applying *Feres* is "[w]as Plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries therefrom. Under this test, the claim was not barred, because Plaintiff, a serviceman, was struck and injured by a military vehicle while leaving his base on a pass, "at his liberty to pursue his personal affairs, he saw fit at the moment of collision." 249 F. Supp. et 628-29. Another formulation was attempted in *Lee* v. *United States*, 261 F. Supp. 252 (C.D. Cal. 1966), a wrongful death action brought

on behalf of two active duty servicemen who were passengers on an air force transport plane which crashed due to alleged negligence of the Federal Aviation Agency. The court reasoned that the proper test given is not whether the claimant was on or off duty but whether the injury "stems from activities that involved an official military relationship between the negligent person and the claimant." Thus, although the deaths were actually "incident to service", the policies underlining *Feres* did not require dismissal of the claims. Such a test given would permit a broad range of claims excluded under the strict "incident to service" rule while protecting the authority of those in command or those responsible for military decisions.

In the weeks preceding the April 19, 1989 accident aboard the U.S.S. Iowa, numerous unauthorized and illegal projectile and propellant firing tests were conducted. The nature of these tests were to explore the accuracy of the sixteen inch gun. Master Chief Gunner's Mate James W. Hickman and Master Chief Fire Controlman S.P. Skelley knew of and approved these abnormal gun charges. Master Chief Fire Controlman S.P. Skelley advocated and coordinated the use of experimental load configurations. The informational data was collected and forwarded to Naval Surface Warfare Center, Dahlgren, Va. These tests, which included mixtures of 1,900 and 2,700-pound projectiles with five bags of D846 powder rather than the required six bags, were in direct violation of Navy standard firing configuration regulations.

On April 19, 1989, the U.S.S. Iowa Turret II sixteen inch gun was loaded with a 2,700 pound projectile and five D846 propellant bags. This action was in direct contradiction to the warning, "Do not Use with 2,700-pound projectiles", written on D846 powder cans and on the literature within the cans. This unauthorized action and the ones which

precede it, were in direct contradiction to the Navy's own policy. Captain Moosally testified that the firing of these guns in this manner were unauthorized and were decided upon solely by Controlman Skelley who was referred to as "the loose cannon on board the ship." Policy requires every type of naval gun to fire only ammunition assemblies authorized for that particular type of gun. The loading and firing of the sixteen inch guns in the manner in which they were was against this policy. In recognition of this unauthorized action the Navy punished those involved.

It is Petitioner's contention that this Honorable Court should hold that unauthorized or illegal military activity is not military activity that the pillars of *Feres* were meant to protect. One of the main goals of the *Feres* Doctrine is to ensure that the disciplinarian role of the military authority is not diminished by way of legal lawsuits. It is unacceptable for the Defendant to argue that *Feres* is a bar to injuries incident to military activity when the military activity is of a nature contrary to the fundamental structures of this country's military force and discipline. An unauthorized and/or illegal activity should not bar a serviceman's claim of injury by the negligence of the United States if performed during unauthorized or illegal activities instituted by the military.

Injuries resulting from conduct beyond the bounds of human decency should not be considered "incident to service" because such conduct is not part of the military mission. *United States* v. *Stanley*, 483 U.S. 683, 709 (1987) (O'Connor, J., dissenting).

Because of the unauthorized and illegal nature of the firing of the sixteen inch gun aboard the U.S.S. Iowa, Petitioners NANCY JO LEWIS, as Personal Representative of the Estate of Richard J. Lewis' claims are not barred by the

Feres Doctrine.

B. WHETHER THE *FERES* DOCTRINE SHOULD APPLY WHEN THE HARM COMPLAINED OF IS THE RESULT OF INADEQUATE OR IMPROPER TRAINING?

The most enduring rationale for the continued application of *Feres* has been the need for unquestioned military discipline as well as military autonomy. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). The same factors necessitating immediate and unquestioning obedience do not operate in peacetime as they do in wartime though. During peacetime, commanding officers have greater opportunity for considered reflection in making their decisions and thereby also have a greater opportunity to prevent harm to their personnel.

The prospect of civil suits arising out of military decisions does not effect discipline anymore than discipline is effected by the possibility of court-martial proceedings. Clearly the actions of a commanding officer can be subject to judicial review through a court-martial proceeding. This would seemingly implicate military discipline just as much as the prospect of a subsequent civil action arising out of erroneous command decisions. Therefore, the reasoning set forth in *Feres*, that the possibility of civil lawsuits will interfere with the ability of the military to conduct its business, is fallacious.

As Justice Antonin Scalia wrote in *United States* v. *Johnson*, 481 U.S. 681, 699 (1987), "I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do

not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said before us."

C. WHETHER THE *FERES* DOCTRINE SHOULD APPLY WHEN THE HARM COMPLAINED OF IS BASED ON A "PRODUCTS LIABILITY" THEORY?

Issues of military discipline and autonomy are not sufficiently implicated in products liability actions to justify being barred by *Feres* either. None of the other factors justifying *Feres* (distinctly federal nature of the relationship between the government and members of the armed forces and availability of existing alternative compensation schemes) come into play either.

In a products liability case, the Petitioner argues that the product involved was unreasonably dangerous, either by design, manufacture, or use. In the instant case, the Petitioner contends that the turret and its mechanisms and in particular the ramming mechanism in Turret II on the U.S.S. Iowa, was unreasonably dangerous and could have been made reasonably safe by the use of technology available prior to the time of the building of the Iowa. There is no issue of military discipline involved in such a claim. None of the reasoning set forth in *Feres* and the cases which have followed it justify barring such an action. Accordingly, Petitioner urges this Court to adopt a products liability exception to *Feres*.

2. WHETHER PETITIONER HAS CLAIMS DERIVING FROM THE EVENTS OCCURRING AFTER HER SON'S DEATH ON THE U.S.S. IOWA 300 MILES OFF THE COAST OF PUERTO RICO; SUCH WRONGFUL ACTS ARE COMPLETELY

INDEPENDENT OF THE PURPORTED NEGLIGENT AND/OR INTENTIONAL CONDUCT THAT LED TO HER SON'S DEATH?

The case of *Kohn v. United States of America, Department of the Army of the United States of America*, 680 F2d 922 (2nd Cir. 1982) is on point with the present case at bar. In *Kohn* parents of the serviceman who was shot to death by a fellow officer brought a lawsuit for their son's conscious pain and suffering, loss of son's society and services, and for independent, post-service acts by the Army which allegedly directly injured them. The trial court dismissed the Plaintiff's complaint for lack of subject matter jurisdiction pursuant to Defendant's Motion to Dismiss under Fed. R. Civ. P. 12. Plaintiffs appealed the trial court's decision. Plaintiffs challenged the District Court's dismissal of their complaint against the United States on the ground that the *Feres* Doctrine barred their claim.

The United States Court of Appeals, Second Circuit reversed the trial judge's ruling and held that *Feres* does not necessarily bar the claims raised by appellants in their own right in their individual cause of action.

Courts have recognized that the *Feres* Doctrine does not preclude recovery for independent, post-service negligent acts by the military, whether the Plaintiff be a serviceman or civilian. *United States v. Brown*, 348 U.S. 110, 112-113, 75 S.Ct. 141, 99 L.Ed. 139 (1954); *LaBash v. United States Department of Army*, 668 F.2d at 1156-57 n.6; *Broudy v. United States*, 661 F.2d 125, 128 (9th Cir. 1981); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1153-54 (5th Cir. 1981).

Petitioner in the present case at bar has claims which derive from the events occurring after her son's death

occurring on the U.S.S. Iowa tragedy. Moreover, the wrongful acts alleged are completely independent of the purported negligent and intentional conduct that led to her son's death.

The result in *Kohn*, supra, has been followed in other circuits. *Dorothy M. Vogelaar v. United States of America*, 665 F.Supp. 1295 (E.D. Mich. 1987). In *Vogelaar*, the mother of the servicemember brought an action against the United States based on the government's alleged failure to timely identify her son's remains. On the United States Motion to Dismiss and for Summary Judgment, the District Court held that the claim was not barred to the extent alleged acts or omissions occurred in the United States. In *Vogelaar, supra*, Barton, the Plaintiff's son, died in Vietnam on July 28, 1970, while serving in the United States Army. At the time of his death, Barton was listed as a deserter from his unit at Camp Radcliff, Republic of Vietnam. Barton's unit departed its location at Camp Radcliff without him on October 20, 1979. On March 28, 1972, as a result of observations by the Vietnamese National Police, a squad of American soldiers was led to the site of a previously undiscovered skeleton at Camp Radcliff, which was later determined to be that of Private Barton on January 21, 1983. The Army thereafter retracted its classification of Barton as a deserter, and his recovered remains were buried with full military honors on February 12, 1986. Plaintiff brought suit alleging that following her son's death, Defendant employees, acting within the scope of their employment, failed to properly investigate the circumstances of his disappearance and improperly identify him as a deserter. In addition, that the Defendant employees failed to properly care for the remains and failed to timely identify and deliver them to her. The Court denied the Defendants' Motion for Summary Disposition and held that the Plaintiff Dorothy M. Vogelaar could maintain a claim against the United States

for the Defendants' negligent actions. Although the claim was based upon her son's involvement in the military, her claim was solely separate and based upon subsequent negligent actions or omissions of the Defendant.

In 1946, the Federal Tort Claims Act (FTCA) stripped away the sovereign immunity of the United States Government. Shortly thereafter in the case of *Feres v. United States*, the Supreme Court held that the United States could not be sued on tort claims growing out of the military service.

The Supreme Court, sensitive to Congress' desire to use the FTCA to "mitigate the unjust consequences of sovereign immunity", explicitly rejected, in the FTCA context, the traditional approach of strictly construing waivers of immunity. *Jayson v. United States*, 340 U.S. 135, 139, (1950), (quoting the *Feres* case). Accord *Block v. Neal*, 460 U.S. 289, 298, (1983), ("the exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced. See also *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir.), ("The [FTCA] is remedial and should be liberally construed to grant the relief contemplated by Congress.)

Although there are some Fourth Circuit opinions that have adhered to the stricter traditional approach, these cases rely primarily on decisions that either preceded the recent liberalization, or that are outside the unique FTCA context. Quoting *Sheridan v. The United States*, 823 F.2d 820, 827, (4th Cir. 1987) dissenting opinion of Chief Judge Harrison L. Winter.

3. WHETHER THE *FERES* DOCTRINE SHOULD BE OVERRULED BECAUSE CONGRESS NEVER

INTENDED TO EXCLUDE THE RECOVERY OF MILITARY SERVICEMEN FOR INJURY OR DEATH CAUSED BY THE NEGLIGENT OR WRONGFUL ACT OR OMISSION OF ANY EMPLOYEE OF THE UNITED STATES WHILE ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT.

Congress never intended to exclude the recovery of military servicemen for injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment. Eighteen Tort claim bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces. The Federal Tort Claims Act, 28 U.S.C. Sec. 1346, as passed made no exception to members of the armed forces.

As dissenting Justice Antonin Scalia noted in *Johnson*, p. 692, "[T]he Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 1346(b), 2671-2680, certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it."

In fact, when Congress enacted the Federal Tort Claims Act, it contained a specific exception, including one for "[A]ny claim arising out of the combatant activities of military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. Sec. 2680(j). See Petitioner's Appendix. Nowhere on the face of the Federal Tort Claims Act is there an exemption prohibiting claims brought by servicemen against the United States during peacetime which did not involve combatant activities.

The United States Supreme Court in 1950 created a judicial exception of the Federal Tort Claims Act known as the *Feres* Doctrine. The United States Supreme Court advances three rationals in its justification of the *Feres* Doctrine. These rationals are:

1. The distinctly federal nature of the relationship between the government and members of the Armed Forces;

2. The availability of existing alternative compensation schemes in the military; and,

3. The fear of damaging military structure and discipline.

These rationales, at best, were ill-reasoned and may have been appropriate when *Feres* was decided over four decades ago. "[T]he *Feres* rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that. The first of them, *Feres'* second rationale, has barely escaped the fate of the "parallel private liability" argument, for though we have not yet acknowledged that it is erroneous we have described it as "no longer controlling." Dissent in *U.S. v. Johnson*, p. 695 (citations excluded).

Other courts have also criticized the *Feres* Doctrine. "[Urging the United States Supreme Court to] limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has breed"; *Atkinson v. United States*, 825 F.2d 202, 206 (1987); *Atkinson v. United States*, 804 F.2d 561 (1986). Others have found fault with the essential vagueness and ambiguity of the doctrine itself. See e.g., *Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987) (per curiam) (noting the "somewhat elusive 'incident

to service' standard"), cert. denied. 485 U.S. 987, 108 S.Ct. 1290, 99 L.Ed.2d 500 (1988); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) (noting that "the basis for the exception has recently become the subject of some confusion"), cert. denied, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982); Persons, 925 F.2d at 295 (citing *Millang* and *Monaco* and noting that "it is entirely unclear which of the doctrine's original justifications survive"). A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales."

Accordingly the Petitioner respectfully requests the United States Supreme Court to adopt the dissent in *Johnson*, p. 703, which argue that "I confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres*. . ."

QUESTIONS ANSWERED

1. Petitioner, whose son was killed in an explosion on April 19, 1989, aboard the U.S.S. Iowa should be allowed to recover under the Federal Tort Claims Act.

2. Petitioner's claims occurring after her son's death on the U.S.S. Iowa are completely independent of the purported negligent and/or intentional conduct that led to her son's death.

3. The *Feres* doctrine should be overruled.

CONCLUSION

On April 19, 1989, forty-seven sailors, citizens of the United States, dedicating their lives to the service of their country, were killed in an explosion aboard the U.S.S. Iowa. The Federal Torts Claim Act put into place by Congress in 1946 had been proposed to Congress to deal with situations wherein the United States government would be responsible for certain tortious conduct. Sixteen of eighteen of the twenty bills between 1925 and 1935 that were proposed to Congress contained military exceptions. Two did not a military exception. Congress specifically chose to adopt a bill that would uniformly handle claims against the United States government as opposed to handling piece-meal bills proposed to Congress on an ad hoc basis each time a claim arose.

The Feres Doctrine was a judicial interpretation by the Supreme Court in 1950 that the military members of the armed services who were injured incident to service would be precluded from having the same rights that any other citizen of the United States would have against the

government.

This 1950 judicial interpretation by the Supreme Court called the Feres Doctrine excepting military members and their families from suit under the Federal Torts Claim Act should no longer stand. A 1950 judicial interpretation of an exception to a law in the United States is not an adequate law in 1992. Tort law has evolved since 1950 much like civil rights law has evolved. To continue to apply 1950 civil rights laws to 1992 cases involving minorities, religious sects, and senior citizens would never be tolerated. Claims of sexual discrimination, religious discrimination, and age and race discrimination simply are no longer tolerated through judicial interpretations of the congressional enactments by the highest court in this land.

Petitioner has not had her day in court and only requests that this Honorable Court, the highest Court in the land, review the 1950 Feres decision and overturn that exception to the Federal Torts Claim Act and allow members of the military the same rights as every other citizen of the United States.

Petitioner requests that the United States Supreme Court review the intellectual wisdom and philosophies and theory behind the Federal Torts Claim Act and revisit those issues allowing the Petitioner to be heard before making any final decision.

How can we as a Society be harmed by having this United States Supreme Court revisit the issues presented herein by the death of forty-seven United States sailors and their families or loved ones?

These families' cries for help and Justice have thus far gone unanswered. All they ask is that this Court, the highest Court in the land, listen to their arguments, be

allowed an opportunity to present their claims, and know that they can accept the fact that at least a decision was made only after a thorough review and revisit by the Court of all the issues before them.

I respectfully request this Honorable Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

Lawrence Patrick Nolan
NOLAN, REINCKE,
THOMSEN & VILLAS, P.C.
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Eaton Rapids, MI 48827-1291
Telephone: (517) 663-3306

APPENDIX

92-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, *et al.*,
Petitioners,

v.

UNITED STATES NAVY, an Agency of the United States Federal Government,
Respondents.

On Petition of Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONER'S APPENDIX FOR WRIT OF CERTIORARI

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28 U.S.C. Sec. 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district court shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C. Sec. 2671

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. Sec. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, s 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer

of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

NANCY JO LEWIS,
Personal Representative of
the Estate of
RICHARD J. LEWIS,
deceased, et al.,

Plaintiffs,

v. CIVIL ACTION
NO. 91-0547-A

UNITED STATES NAVY, an Agency
of the United States,

Defendant.

MEMORANDUM OPINION

This matter came before the court on defendant's motion to dismiss, or in the alternative, for summary judgment. Defendant argues that the court lacks jurisdiction over the subject matter of this case because the deaths of the sailors on the USS Iowa arose during the course of activity incident to their military service. Plaintiffs argue that this court should create an exception to the *Feres* doctrine and permit this suit to go forward. They further argue that even if the court does not make an exception under *Feres* for their negligence claims, the claim brought pursuant to the Suits in Admiralty Act (SAA), 46 U.S. C. §§ 741-752, is not barred by *Feres*.

On April 19, 1989, 47 United States' sailors, all of whom were on active duty at the time, died when Turret II of their battleship, the USS Iowa, exploded. The explosion occurred

while the battleship and its crew were engaged in training exercises approximately 300 miles off the coast of Puerto Rico. Plaintiffs named the United States Navy as the defendant in this case and asserted claims for the Navy's negligent design, testing, inspection and maintenance of Turret II, negligent failure to train, evaluate and staff the personnel for the Turret II, and failure to warn of the hazards associated with the operation of Turret II. In addition, the plaintiffs have brought claims pursuant to the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, the Suits in Admiralty Act (SAA), 46 U.S.C. § 741 *et seq.*, and the Public Vessels Act (PVA), 46 U.S.C. § 781 *et seq.*

The defendant's argue that all claims which the plaintiffs have asserted are barred under the doctrine enunciated in *Feres v. United States*, 349 U.S. 135 (1950). Under the *Feres* doctrine, servicemen are barred from suing the United States for injuries occurring in the course of activity incident to service. *Feres* at 146. In this case, the plaintiffs' decedents were on active military duty in the United States Navy and engaged in military operations and duties on the date of their deaths. Their deaths were sustained in the course of activity incident to service.

Plaintiffs do not argue that the deaths were not sustained in the course of activity incident to service but, instead, they argue that there is no necessity for the *Feres* doctrine: 1) the distinctly federal nature of the relationship between the government and members of the Armed Forces; 2) the availability of existing alternative compensation schemes in the military, and; 3) the fear of damaging military structure and discipline. Plaintiffs contend that the rationale of the *Feres* doctrine does not come into play when there is egregious behavior on the part of the military personnel, when training is insufficient, and when the action is a products liability action. However, there is no authority for any such exceptions to the rule in *Feres*. Other courts have considered such exceptions and have also rejected them. *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982) (no egregious behavior exception); *Sigler v. Le Van*, 485 F. Supp 185 (D. Md. 1980) (the factual situation of injury to military personnel incident to service triggers the application of the

Feres doctrine and not the underlying legal theory of plaintiffs' claims); *Kitowski v. United States*, 931 F.2d 1526 (11th Cir. 1991) (no training exercise exception).

The bar of *Feres* applies whether jurisdiction is founded under the Federal Tort Claims Act, the Public Vessels Act, or the Suits in Admiralty Act. "The rationals supporting the ruling in *Feres* limiting the waiver of sovereign immunity applies with equal force in the context of governmental immunity in admiralty." *Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980). *See also Potts v. United States*, 723 F.2d 20 (6th Cir. 1983) and *Beaucoudray v. United States*, 490 F.2d 86 (5th Cir. 1974). Finally, the claims by these plaintiffs, as family members, also fail under the *Feres* doctrine as they are derivative to the servicemen's action for his own injury incident to military service. *Lombard v. United States*, 690 F.2d 215, 223 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

An appropriate order shall issue.

/s/Claude M. Hilton
United States District Judge

Alexandria, Virginia
July 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

NANCY JO LEWIS,
Personal Representative of
the Estate of
RICHARD J. LEWIS,
deceased, et al.,

Plaintiffs,

v. CIVIL ACTION
NO. 91-0547-A

UNITED STATES NAVY, an Agency
of the United States,

Defendant.

ORDER

This matter came before the court on defendant's motion to dismiss, or in the alternative, for summary judgment. For the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that defendant's motion to dismiss is GRANTED.

/s/Claude M. Hilton
United States District
Judge

Alexandria, Virginia
July 29, 1991

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, Deceased; LISA J. EVERHART, Administrator for suit purposes of the Estate of Leslie Allen Everhart, Jr.; ADELAIDA MARTINEZ, Administrator of the Estate of Jose Luis Martinez, Jr., SHARON A. ZIEGLER, Administrator of the Estate of Reginald Owen Ziegler; EVAN B. BATTLE, Administrator of the Estate of Dwayne Collier Battle; JOYCE C. TATHAM, Administrator of the Estate of Todd Thomas Tatham; RHONDA JOHNSON, Personal Representative of the Estate of Ramon Jerel Bradshaw; ROBERT J. GEDEON, JR., Administrator of the Estate of Robert J. Gedeon, III; REGINALD JOHNSON, JR., Administrator of the Estate of Reginald Johnson, Jr.; APRIL E. HANYECZ, Administrator of the Estate of Ernest E. Hanyecz, LILLIE DENISE JUSTICE, Administratrix of the Personal Estate of Michael Shannon Justice; PEGGY JEAN PRICE, Administratrix of the Estate of Matthew Ray Price; DAVID A. WILLIAMS, Independent Administrator of the Estate of Michael Robert Williams; LUCILLE

No. 91-1793

S. YOUNG, Personal Representative of the Estate of John Rodney Young; SUSAN MARIE BACKHERMS, Administratrix of the Estate of Robert Wallace Backherms; MARILYN M. HANSON, Special Administrator of the Estate of David L. Hanson; SHIRLEY DeVAUL, Administrator of the Estate of Milton Francis DeVaul, Jr., GLADYS ELAINE CARNS STILLWAGON, Administratrix of the Estate of Heath Eugene Stillwagon; RICHARD T. LAWRENCE, Administrator of the Estate of Richard E. Lawrence; CARNELL J. WHITE, Administrator of the Estate of Rodney Maurice White; NATHANIEL C. GOINS, SR., Administrator of the Estate of John Leonard Goins; MARY CLARE WELDEN, Personal Representative of the Estate of Stephen Joseph Welden; DALE I. SCHELIN, Special Administrator of the Estate of Geoffrey Scott Schelin; ALAN LEE HOLT, Administrator of the Estate of Scott Alan Holt; PATSY McMULLEN, Administratrix of the Estate of Todd Christopher McMullen; RONALD LEROY PETERSON, Administrator of the Estate of Ricky Ronald Peterson; PAUL BOPP, Representative of the Estate of Peter Edward Bopp; MELVIN C. FOLEY, Representative of the Estate of Tyrone Dwayne Foley; LINDA GENDRON, Representative of the Estate of Brian Wayne Gendron; PERI HELTON, Representative of the Estate of

Michael William Helton; PATRICIA KIRKPATRICK, Representative of the Estate of Eric Ellis Casey; CAROL NICHELSON, Representative of the Estate of Ryan Robert Jones; MARY E. OGDEN, Representative of the Estate of Darin Ogden; LEASA S. THOMPSON, Representative of the Estate of Jack Ernest Thompson, Jr.; SHELLY WHITE, Representative of the Estate of James Darrell White; EARL V. HARTWIG, Executor of the Estate of Clayton Hartwig; ROBERT L. MORRISON, Administrator of the Estate of Robert Kenneth Morrison; and all those similarly situated,

Plaintiffs/Appellants,

and

JOE BUCH, Representative of the Estate of Philip Edward Buch,

Plaintiff,

v.

UNITED STATES NAVY, an Agency of the United States Federal Government,

Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.

(CA-91-547-A)

Submitted: May 6, 1992

Decided: September 11, 1992

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

John J. Lynch, Birmingham, Michigan; Kreig J. Brusnahan, Cleveland, Ohio; William Hassan, Fairfax, Virginia, for Appellants. Stuart M. Gerson, Assistant Attorney General, Debra J. Kossow, Senior Admiralty Counsel, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Kenneth E. Melson, United States Attorney, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The Appellants appeal from the district court's order dismissing their wrongful death actions against the United States Navy arising out of an explosion aboard the USS Iowa which killed forty-seven sailors. We affirm.

Servicemen are barred from suing the United States for injuries occurring in the course of activity incident to service.

Feres v. United States, 340 U.S. 135 (1950). The Plaintiff's concede that the decedents were on active military duty in the United States Navy and that they were engaged in military operations at the time of their deaths. Nevertheless, they argue that there should be certain exceptions created under the *Feres* doctrine: (1) where the harmful conduct on the part of military officials is egregious; (2) where the injuries are sustained as a result of inadequate or improper training; (3) where the action is based on theories of products liability; and, (4) where the claim is brought pursuant to the Suits in Admiralty Act (SAA), 46 U.S. C. §§ 741-752.

In declining to create any such exceptions, we follow every Circuit which has addressed this issue. *See Laswell v Brown*, 683 F.2d 261, 265 (8th Cir. 1982) (no exception for egregious conduct), *cert. denied*. 459 U.S. 1210 (1983); *Kitowski v. United States*, 931 F.2d 1526 (11th Cir.) (*Feres* doctrine applied to claims arising out of training exercises), *cert. denied*, 60 U.S.L.W. 3342 (U.S. 1991); *Potts v. United States*, 723 F.2d 20, 21-22 (6th Cir. 1983) (*Feres* doctrine applies with equal force to bar suits brought pursuant to the SAA), *cert. denied*, 466 U.S. 959 (1984); *see also Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977) (*Feres* doctrine applied in indemnity action raising products liability claims against United States).

Because Plaintiffs' injuries arose in the course of activity incident to service and are not within any exception to *Feres*, we affirm the decision of the district court dismissing the complaint.

AFFIRMED

FILE COPY

FILED: SEPTEMBER 11, 1992

JUDGMENT

UNITED STATES COURT OF APPEALS
for the

Fourth Circuit

No. 91-1793
CA-91-547-A

NANCY JO LEWIS, Personal Representative of the Estate of Richard J. Lewis, Deceased; LISA J. EVERHART, Administrator for suit purposes of the Estate of Leslie Allen Everhart, Jr.; ADELAIDA MARTINEZ, Administrator of the Estate of Jose Luis Martinez, Jr., SHARON A. ZIEGLER, Administrator of the Estate of Reginald Owen Ziegler; EVAN B. BATTLE, Administrator of the Estate of Dwayne Collier Battle; JOYCE C. TATHAM, Administrator of the Estate of Todd Thomas Tatham; RHONDA JOHNSON, Personal Representative of the Estate of Ramon Jerel Bradshaw; ROBERT J. GEDEON, JR., Administrator of the Estate of Robert J. Gedeon, III; REGINALD JOHNSON, JR., Administrator of the Estate of Reginald Johnson, Jr.; APRIL E.

No. 91-1793

HANYECZ, Administrator of the Estate of Ernest E. Hanyecz, LILLIE DENISE JUSTICE, Administratrix of the Personal Estate of Michael Shannon Justice; PEGGY JEAN PRICE, Administratrix of the Estate of Matthew Ray Price; DAVID A. WILLIAMS, Independent Administrator of the Estate of Michael Robert Williams; LUCILLE S. YOUNG, Personal Representative of the Estate of John Rodney Young; SUSAN MARIE BACKHERMS, Administratrix of the Estate of Robert Wallace Backherms; MARILYN M. HANSON, Special Administrator of the Estate of David L. Hanson; SHIRLEY DeVAUL, Administrator of the Estate of Milton Francis DeVaul, Jr., GLADYS ELAINE CARNS STILLWAGON, Administratrix of the Estate of Heath Eugene Stillwagon; RICHARD T. LAWRENCE, Administrator of the Estate of Richard E. Lawrence; CARNELL J. WHITE, Administrator of the Estate of Rodney Maurice White; NATHANIEL C. GOINS, SR., Administrator of the Estate of John Leonard Goins; MARY CLARE WELDEN, Personal Representative of the Estate of Stephen Joseph Welden; DALE I. SCHELIN, Special Administrator of the Estate of Geoffrey Scott Schelin; ALAN LEE HOLT, Administrator of the Estate of Scott Alan Holt; PATSY McMULLEN, Administratrix of the Estate of Todd Christopher McMullen; RONALD LEROY

PETERSON, Administrator of the Estate of Ricky Ronald Peterson; PAUL BOPP, Representative of the Estate of Peter Edward Bopp; MELVIN C. FOLEY, Representative of the Estate of Tyrone Dwayne Foley; LINDA GENDRON, Representative of the Estate of Brian Wayne Gendron; PERI HELTON, Representative of the Estate of Michael William Helton; PATRICIA KIRKPATRICK, Representative of the Estate of Eric Ellis Casey; CAROL NICHELSON, Representative of the Estate of Ryan Robert Jones; MARY E. OGDEN, Representative of the Estate of Darin Ogden; LEASA S. THOMPSON, Representative of the Estate of Jack Ernest Thompson, Jr.; SHELLY WHITE, Representative of the Estate of James Darrell White; EARL V. HARTWIG, Executor of the Estate of Clayton Hartwig; ROBERT L. MORRISON, Administrator of the Estate of Robert Kenneth Morrison; and all those similarly situated,

Plaintiffs - Appellants

and

JOE BUCH, Representative of the Estate of Philip Edward Buch

Plaintiff,

v.

UNITED STATES NAVY, an Agency of the United States Federal Government

Defendant - Appellee

ORDER

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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This was heard by the Court on the record from the District Court.

The Court affirms the judgment of the District Court.

/s/ Bert M. Montague